(20)

No. 92-780

FILED
SEP 29 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE

KEITH A. FOURNIER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570

VINCENT P. MCCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

JAY ALAN SEKULOW
(Counsel of Record)
WALTER M. WEBER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

57 pp

QUESTIONS PRESENTED

1. Whether the federal RICO statute, 18 U.S.C. § 1962(c) and (d), applies to social protest activities undertaken with a complete absence of any mercenary purpose?
2. Whether respondents' sit-ins and other nonviolent social protest activities constitute predicate "extortion" under the Hobbs Act, 18 U.S.C. § 1951?
3. Whether petitioners lack standing?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF CASE	3
1. Statement of Facts	3
2. Course of Proceedings	6
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. PETITIONERS DWHO AND SUMMIT LACK STANDING	8
A. Petitioners Lack Article III Standing	8
1. No allegation by DWHO or Summit against Project Life	9
2. No allegations by DWHO or Summit against Terry or Operation Rescue	9
B. Petitioners Lack RICO Standing	11
II. PETITIONERS' RICO CLAIMS MUST FAIL BECAUSE RESPONDENTS' ACTIVITIES REFLECT NO MERCENARY PURPOSE	15
A. RICO Does Not Apply to Social Protest Activities Undertaken Without Any Mercenary Purpose	17
1. This Court's view of the purpose of RICO	18
2. The statutory language	19
a. Enterprise	19
b. Title, preface, definitions, remedies	22

TABLE OF CONTENTS—Continued

	Page
3. Workability	23
B. Respondents' Activities Reflect No Mercenary Purpose	25
III. PETITIONERS HAVE FAILED TO ALLEGE ANY PREDICATE ACTS UNDER RICO	26
A. Petitioners Cannot Rely Upon Insinuations of "Arson" or "Bombing"	27
B. Petitioners' Have Not Alleged Conduct which Constitutes Exortion under the Hobbs Act	28
1. The missing elements	31
a. No allegation of "obtaining"	31
i. Plain meaning of "obtaining"	31
ii. Meaning of "obtaining" under New York extortion law	32
iii. Meaning of "obtaining" at common law: extortion vs. coercion	33
(a). Extortion at common law	34
(b). Statutory distinction between extortion and coercion	35
b. No allegation of "property"	38
c. No allegation of "force, violence, or fear"	41
2. The rules of statutory construction	43
a. Avoiding constitutional difficulties	43
b. Federalism	44
c. Rule of lenity	45
CONCLUSION	46

TABLE OF AUTHORITIES

Cases	Page
Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987)	23
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	8, 9
Blum v. Bacon, 457 U.S. 132 (1982)	26
Board of Regents v. Roth, 408 U.S. 564 (1972)	39
Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993)	26
Brennan v. Arnheim & Neely, Inc., 410 U.S. 512 (1973)	21
Cantwell v. Connecticut, 310 U.S. 296 (1940)	43
Carpenter v. United States, 484 U.S. 19 (1987)	40
City of Houston v. Hill, 482 U.S. 451 (1987)	43
Cohen v. California, 403 U.S. 15 (1971)	43
Commissioner v. Engle, 464 U.S. 206 (1984)	17
Crandon v. United States, 494 U.S. 152 (1990)	17
Cuyler v. Sullivan, 446 U.S. 335 (1980)	27
Dandridge v. Williams, 397 U.S. 471 (1970)	26, 27
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)	43
Evans v. United States, 112 S. Ct. 1881 (1992)	32, 33, 34
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)	17
Gollust v. Mendell, 111 S. Ct. 2173 (1991)	21
Gregory v. Ashcroft, 111 S. Ct. 2395 (1991)	44
H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)	20
Holmes v. SIPC, 112 S. Ct. 1311 (1992)	11, 13, 14, 16
Levine v. United States, 383 U.S. 265 (1966)	10
Lucero v. Operation Rescue of Birmingham, No. CV91-PT-1082-S (N.D. Ohio Dec. 23, 1992)	25
Malley v. Briggs, 475 U.S. 335 (1986)	17
McCormick v. United States, 111 S. Ct. 1807 (1991)	41, 46
McNally v. United States, 483 U.S. 350 (1987)	39, 40, 45
Meyer v. Nebraska, 262 U.S. 390 (1923)	39
Miles v. Apex Marine Corp., 111 S. Ct. 317 (1990)	21

TABLE OF AUTHORITIES—Continued

Page

Morissette v. United States, 342 U.S. 246 (1952) 34
NAACP v. Button, 371 U.S. 415 (1963) 44
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 11, 24, 41, 43, 44
National Organization for Women v. Scheidler, 765 F. Supp. 937 (N.D. Ill. 1991) 6
National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992) .... 6, *passim*
National Organization for Women v. Scheidler, 113 S. Ct. 2958 (1993) 6
New York v. United States, 112 S. Ct. 2408 (1992) .. 43, 44
Ngiraingas v. Sanchez, 495 U.S. 182 (1990) 16
Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) 37, 38, 42
People v. Ryan, 232 N.Y. 234, 133 N.E. 572 (1921) 32
People v. Squillante, 18 Misc. 2d 516, 185 N.Y.S.2d 357 (Sup. Ct. 1959) 32
People v. Whaley, 6 Cow. 661 (N.Y. 1827) 32
Reves v. Ernst & Young, 113 S. Ct. 1163 (1993) 16, 17
Russello v. United States, 464 U.S. 16 (1983) 18, 19, 31
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 11, 19, 21
Taylor v. United States, 495 U.S. 575 (1990) 33
Texas v. Johnson, 491 U.S. 397 (1989) 43
Thornhill v. Alabama, 310 U.S. 88 (1940) 43
Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990) 2, 41
Town of West Hartford v. Operation Rescue, 792 F. Supp. 161 (D. Conn. 1992), *vacated*, 991 F.2d 1039 (2d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3093 (U.S. July 19, 1993) (No. 93-126) 2
United States v. Alpers, 338 U.S. 680 (1950) 17
United States v. Anderson, 716 F.2d 446 (7th Cir. 1983) 38
United States v. Bagaric, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 917 (1983) 24, 25

TABLE OF AUTHORITIES—Continued

Page

United States v. Bass, 404 U.S. 336 (1971) 42, 44
United States v. Caldes, 457 F.2d 74 (9th Cir. 1972) 42
United States v. Cerelli, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) 37
United States v. Culbert, 435 U.S. 371 (1978) 41
United States v. Enmons, 410 U.S. 396 (1973) 24, 32, 42, 45, 46
United States v. Ferguson, 758 F.2d 843 (2d Cir. 1985), *cert. denied*, 474 U.S. 1023 (1985) 25
United States v. Flynn, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988) 25
United States v. Green, 350 U.S. 415 (1956) 38
United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) 23, 25
United States v. Kozminski, 487 U.S. 931 (1988) 45, 46
United States v. Nardello, 393 U.S. 286 (1969) 37
United States v. Nedley, 255 F.2d 350 (3d Cir. 1958) 32, 33, 38
United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) 22
United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114 (E.D.N.Y. 1992) 37
United States v. Starks, 515 F.2d 112 (3d Cir. 1975) 37
United States v. Staszcuk, 517 F.2d 53 (7th Cir.) (en banc), *cert. denied*, 423 U.S. 837 (1975) 44
United States v. Sweeney, 262 F.2d 272 (3d Cir. 1959) 38
United States v. Turkette, 452 U.S. 576 (1981) 18, 22, 31
United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., 113 S. Ct. 2173 (1993) 17
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 8
Webster v. Operation Rescue, No. 91-C-20138 (N.D. Ill. Oct. 9, 1992) (1992 WL 281366) 25
Women's Pavilion, Inc. v. Moriarty, No. 3:91CV-7250 (N.D. Ohio Dec. 23, 1992) 25

TABLE OF AUTHORITIES—Continued

Constitutions, Rules, and Statutes	Page
U.S. Const. amend. I	44
U.S. Const. art. III	7, 8, 9, 15
Rule 12(b)(6), Fed. R. Civ. P.	3, 7
Rule 15, Fed. R. Civ. P.	3
18 U.S.C. § 1951	7, 15, 28
18 U.S.C. § 1951(a)	28
18 U.S.C. § 1951(b)(2)	28, 31, 38, 41
18 U.S.C. § 1961(1)	27, 28
18 U.S.C. § 1961(3)	23
18 U.S.C. § 1961(4)	19
18 U.S.C. § 1961(5)	27
18 U.S.C. § 1962	11, 23
18 U.S.C. § 1962(a)	1, *passim*
18 U.S.C. § 1962(b)	21
18 U.S.C. § 1962(c)	1, *passim*
18 U.S.C. § 1962(d)	1, *passim*
18 U.S.C. § 1963	23
18 U.S.C. § 1963(e)	21
18 U.S.C. § 1964(c)	11, 23
29 U.S.C. § 203(r)(1)	21
42 U.S.C. § 1983	17
ALA. CODE §§ 13A-8-13, 13A-6-25 (1982)	36
ALASKA STAT. §§ 11.41.520, 11.41.530 (1989)	36
ARIZ. REV. STAT. ANN. § 13-1804 (1989)	36
ARK. CODE ANN. §§ 5-36-103(a)(2), 5-13-208 (Michie 1987 & Supp. 1991)	36
CAL. PENAL CODE § 518 (1988)	36
COLO. REV. STAT. ANN. § 18-3-207, § 18-4-401 (West 1990)	36
CONN. GEN. STAT. ANN. § 53a-119(5) (West Supp. 1993)	36
DEL. CODE ANN. tit 11, §§ 846, 791 (Supp. 1992)	36
FIELD CODE OF 1865 §§ 584, 613 (1865)	32, 33
FLA. STAT. ANN. § 836.05 (West 1976)	36
GA. CODE ANN. § 16-8-16 (1992)	36
HAW. REV. STAT. § 707-764 (1988)	36
IDAHO CODE § 18-2403(2)(e) (1987)	36
ILL. ANN. STAT. ch. 38, para. 16-1(a)(3) (Smith-Hurd Supp. 1992)	36

TABLE OF AUTHORITIES—Continued

	Page
IND. CODE ANN. §§ 35-45-2-1, 35-43-4-1(b)(7) & 35-43-4-2 (Burns Supp. 1992)	36
IOWA CODE ANN. § 711.4 (West 1979)	36
KAN. STAT. ANN. §§ 21-3701(c), 21-3428 (1988)	37
KY. REV. STAT. § 514.080 (Baldwin 1984 & Supp. 1992)	36
LA. REV. STAT. ANN. § 14:66 (West 1986)	36
ME. REV. STAT. ANN. tit. 17-A, § 355 (1983)	36
MD. CRIM. LAW CODE ANN. § 562B (1992)	36
MASS. GEN. LAWS ANN. ch. 265, § 25 (West 1990)	36
MICH. COMP. LAWS ANN. § 750.213 (West 1991)	36
MINN. STAT. ANN. § 609.27 (West 1987)	36
MISS. CODE ANN. § 97-3-81, § 97-3-87 (1973)	36
MO. ANN. STAT. § 570.030 (Vernon Supp. 1993)	36
MONT. CODE ANN. §§ 45-6-301(2), 45-5-203 (1991)	36
NEB. REV. STAT. § 28-513 (1989)	36
NEV. REV. STAT. ANN. §§ 205.320, 207.190 (Michie 1992)	36
N.H. REV. STAT. ANN. § 637:5 (1986)	36
N.J. STAT. ANN. §§ 2C:20-5, 2C:13-5 (West 1982)	36
N.M. STAT. ANN. § 30-16-9 (1984)	36
N.Y. PENAL LAW §§ 155.05(2)(e) (McKinney 1988), 135.60 (McKinney 1987)	36
N.C. GEN. STAT. § 14-118.4 (1986)	36
N.D. CENT. CODE §§ 12.1-23-02(2), 12.1-17-06 (1985)	36
OHIO REV. CODE ANN. §§ 2905.11, 2905.12 (Anderson 1993)	36
OKLA. STAT. ANN. tit. 21, §§ 1481, 1488 (West 1983)	37
OR. REV. STAT. §§ 164.075, 163.275 (1990)	36
18 PA. CONS. STAT. ANN. §§ 3923, 2906 (Purdon 1983)	36
R.I. GEN. LAWS § 11-42-2 (Supp. 1992)	37
S.C. CODE ANN. § 16-17-640 (Law. Co-op. 1985)	36
S.D. CODIFIED LAWS ANN. § 22-30A-4 (1988)	36
TENN. CODE ANN. § 39-14-112 (1991)	37
TEX. PENAL CODE ANN. § 31.03 (West 1989)	36

TABLE OF AUTHORITIES—Continued

	Page
UTAH CODE ANN. § 76-6-406 (1990)	36
VT. STAT. ANN. tit. 13, § 1701 (Supp. 1992)	37
VA. CODE ANN. § 18.2-59 (1988)	36
WASH. REV. CODE ANN. §§ 9A.56.110, 9A.36.070 (1988)	36
W. VA. CODE § 61-2-13 (1992)	36
WIS. STAT. ANN. § 943.30 (West 1982)	37
WYO. STAT. § 6-2-402 (1988)	37
Other Authorities	
31A Am. Jur. 2d *Extortion, Blackmail, and Threats* (1989)	33
2 M. Bacon, *A New Abridgement of the Law* 453 (1778)	35
Black's Law Dictionary (5th ed. 1979)	22, 31
4 W. Blackstone, *Commentaries* (1769)	34
Califa, *RICO Threatens Civil Liberties*, 43 Vand. L. Rev. 805 (1990)	44
E. Coke, *First Institute* 584 (J. Thomas ed. 1826)	35
91 Cong. Rec. 11912 (1945)	41
T. Dogherty, *Crown Circuit Companion* 358 (7th ed. 1799)	35
W. Hawkins, *A Treatise of the Pleas of the Crown* (6th ed. 1788)	35
Lindgren, *The Elusive Distinction Between Bribery and Extortion: from the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815 (1988)	34, 35
Model Penal Code §§ 2125, 2234 (1980)	35
Oxford English Dictionary (2d ed. 1989)	31
W. Russell, *A Treatise on Crimes and Misdemeanors* (5th Am. ed. 1845)	35
Webster's Third New International Dictionary (1986)	20, 21, 22
2 F. Wharton, *A Treatise on the Criminal Law*, § 1574 n.2 (8th ed. 1880)	35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-780

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE

INTRODUCTION

This brief is filed on behalf of respondents Randall A. Terry, Operation Rescue, and Project Life.[1]

Petitioners initiated this action for declaratory and injunctive relief and damages by invoking the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. §§ 1962(a), (c) and (d)),[2] federal antitrust law,[3] and pendent state law.[4]

[1] None of these respondents is a corporation. *See* Rule 29.1.

[2] Petitioners' claim under § 1962(a) is not before this Court. The courts below rejected this claim, and petitioners did not seek review of those rulings in this Court.

[3] The antitrust claim is not before this Court. The courts below rejected this claim, and this Court denied review.

[4] Petitioners did not allege any pendent state law claims against respondents Randall A. Terry, Project Life, or Operation Rescue.

[Continued]

After nearly five years of litigation, including considerable discovery and repeated amendment of its complaint, petitioners remained unable to plead a valid cause of action under the governing federal statutes. The district court dismissed petitioners' lawsuit and the court of appeals affirmed that judgment. This Court should affirm the judgment of the court of appeals.

Petitioners Delaware Women's Health Organization and Summit Women's Health Organization, Inc.—two self-described "commercial establishments," Pet. at 6—seek to distort the federal racketeering statute into a weapon for use against social protest activities. Petitioners simultaneously seek to stretch the federal criminal extortion statute to cover virtually any conduct which forms a part of social protest activities.

This Court should finally terminate a lawsuit that was frivolous from its inception.[5] To allow this suit to proceed—as petitioners request—would be to signal a green light for the routine inclusion of civil RICO claims in all litigation involving social protest movements. Such a result would chill legitimate protest and further burden the federal judiciary, all at the expense of disregarding accepted canons of statutory construction.

---

[4] [Continued]

The state law claims alleged against other respondents are "tortious interference with prospective economic advantage" (Count V), "tortious interference with existing business relationship" (Count VI), and (against defendant Vital-Med) "breach of duty of confidentiality" (County VII). The district court dismissed these claims without prejudice, and petitioners have not challenged the propriety of this dismissal in their briefs either in the court of appeals or in this Court.

[5] To state that the theory of petitioners' case borders on the absurd is to understate the situation. *See* Brief in Opposition of Respondents Randall A. Terry, *et al.* § I (petitioners listed Supreme Court Justices, politicians, journalists, etc. as having knowledge of the facts of the alleged antitrust and RICO conspiracies). Like the Second Circuit in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), this Court should decline to "countenance fanciful invocations of the draconian RICO weapon in civil litigation," *id.* at 104.

Petitioners' case must fail for several independent reasons: first, petitioners cannot meet the threshold requirement of standing to bring suit under RICO; second, RICO does not apply to social protest activities which lack all mercenary purpose; and third, petitioners' RICO claim fails for lack of the necessary predicate acts: the sit-ins and similar social protest tactics alleged in this case cannot conceivably be treated as federal criminal extortion.

STATEMENT OF CASE

1. Statement of Facts [6]

Petitioners Delaware Women's Health Organization (DWHO) and Summit Women's Health Organization, Inc. (Summit) are commercial abortion businesses in Wilmington, Delaware and Milwaukee, Wisconsin, respectively. Second Amended Complaint (Cplt.) ¶¶ 6-7 (J.A. 41-42); *see also* Pet. at 6 (describing abortion businesses as "commercial establishments").

According to petitioners' complaint,[7] respondents consist of individuals and organizations, Cplt. ¶¶ 9, 11-12, 14-15, 17, 19-20 (J.A. 42-44), sharing a common goal of shutting down all abortion businesses in the United States, *id.* ¶ 26 (J.A. 46). These respondents are part of the "activist anti-abortion movement." *Id.* ¶ 52 (J.A. 53); *id.* ¶ 9 (J.A. 42) (respondent Scheidler is "the director

---

[6] Petitioners' statement of the case is argumentative (according to petitioners, every pro-life activist is an "extremist" and a "terrorist"), reaches outside the record, and disregards the legal and constitutional requirements for vicarious liability. Such antics suggest that petitioners recognize that their lawsuit cannot stand on its own merits. *See also* Pet. Br. at 41-42 (ad hominem slurs against pro-life individuals).

[7] The district court dismissed petitioners' suit under Rule 12 (b)(6), Fed. R. Civ. P. Accordingly, for purposes of this brief respondents assume the truth of all facts properly alleged in the complaint. Petitioners, for their part, are limited to their complaint and may not resort to the RICO Case Statement to fill in gaps in a deficient complaint. A RICO Case Statement may explain, focus, or *limit* allegations in a complaint; it cannot *expand* upon or *substitute* for the complaint. *Compare* Rule 15, Fed. R. Civ. P.

of defendant Pro-Life Action League, Inc."); *id.* at ¶ 11 (J.A. 42) (respondent Terry is "the national organizer of Operation Rescue"). Respondents have agreed to "drive . . . out of business" every abortion business in the country. *Id.* ¶ 26 (J.A. 46).

The methods various respondents and other pro-life individuals allegedly employ to shut down abortion businesses include: distribution of a book "outlining methods intended to be used to interfere with and stop" abortion businesses from operating, *id.* ¶ 28 (J.A. 47) (Scheidler); training and "encouraging" other persons to use these techniques to close abortion businesses, *e.g.*, *id.* ¶¶ 29 (Scheidler), 30 (Scheidler, Terry, Scholberg, Murphy, Migliorino), 35 (J.A. 48) (Terry); organizing or participating in blockades and trespassing at abortion businesses, *e.g.*, *id.* ¶¶ 59-63 (J.A. 56-57) (various respondents and thousands of other unnamed participants); stealing fetal remains from co-defendant Vital-Med Laboratories, Inc., and then arranging "highly-publicized" funeral services and burials for these remains, *id.* ¶¶ 64-74 (J.A. 57-58) (Scheidler, Scholberg, Murphy, Migliorino, Wojnar, PLAL and other non-defendant participants);[8] damaging or destroying abortion business property (surgical supplies), *id.* ¶ 42 (J.A. 50) (non-defendant Joan Andrews); picketing, *id.* ¶¶ 48-50 (J.A. 51-52) (Scheidler and Terry); and pressuring a landlord not to lease space to petitioner Summit, *id.* ¶¶ 77-78 (J.A. 61-62) (Migliorino).

The bulk of petitioners' allegations describe activities directed at *other* abortion businesses, i.e., *not* the petitioners DWHO or Summit. *E.g.*, *id.* ¶¶ 38 (J.A. 49) (Women's Awareness Clinic in Florida), 42 (J.A. 50)

---

[8] Respondent Scheidler announced publicly in 1988 that the remains were "individually packaged and labelled . . . with the names of the mothers, doctors, dates and places" of the abortions. *Id.* ¶ 70 (J.A. 59). Petitioners have not alleged that any of the respondents have "threatened" to reveal this information. Petitioners' *legal* conclusion that respondents "threatened to disclose confidential information about previous patients," *id.* ¶¶ 98(j), 98(l) (J.A. 69-70) (Count II) (listing alleged predicate acts), finds no support in petitioners' *factual* allegations.

(Ladies Center of Pensacola, Inc. in Florida), 60 (J.A. 56) (various sites in the State of New York). Other allegations refer to efforts targeting abortion businesses *in general*. *E.g.*, *id.* ¶¶ 28-30 (J.A. 47) (promoting efforts to close abortion businesses "such as DWHO and Summit").

Petitioners do not allege that respondents Terry, Operation Rescue (OR), or Project Life undertook any activity at or against DWHO or Summit. In fact, few allegations refer to *anyone* taking action at or against DWHO and Summit. *See id.* ¶¶ 44 (J.A. 50) (trespass by Scheidler at DWHO and "threat" by Scheidler, to DWHO administrator, of "reprisals" if she did not quit her job), 71 (J.A 59) (Migliorino arranged funeral and burial for 1200 aborted babies and stated that 700 of the bodies came from Summit and another Milwaukee abortion business), 76 (J.A. 60) (defendant Vital-Med, a pathology service, refused to accept further aborted babies from DWHO or Summit), 77-78 (J.A. 61-62) (Migliorino helped induce breach of Summit's lease). None of these allegations involve respondents Terry, OR, or Project Life.

Petitioners allege that respondents receive income in the form of "contributions . . . in support" of their acts designed to shut down abortion businesses, *id.* ¶ 100 (J.A. 71), and that certain individual respondents receive salaries and benefits for their pro-life work, *id.*

Petitioners have *not* alleged that respondents have received any income or other property aside from donations from their pro-life supporters (and salaries and benefits derived from these donations). Petitioners have *not* alleged that respondents have demanded, requested, or even suggested that petitioners or any other abortion businesses, staff, or clientele turn over money or other property either to respondents or to any other persons or organizations. Furthermore, petitioners have *not* alleged that any of the respondents have any financial or economic purpose for shutting down abortion businesses. Nor have petitioners alleged that respondents have any purpose for their actions

other than a genuine, deeply held desire to stop the killing of unborn children by abortion.

2. Course of Proceedings

Petitioners filed their original complaint on October 17, 1986 (J.A. 1), an amended complaint on February 2, 1989 (J.A. 9), and a second amended complaint on September 22, 1989 (J.A. 13). The second amended complaint (J.A. 39) alleged claims under the RICO (§§ 1962(a), (c), (d)) and antitrust statutes and included pendent state law claims. On March 18, 1991, petitioners submitted a RICO Case Statement (J.A. 87) in response to an order of the district court (J.A. 81).

On May 28, 1991, the district court dismissed the second amended complaint. *National Organization for Women v. Scheidler,* 765 F. Supp. 937 (N.D. Ill. 1991) (Pet. B-1 to 18). The district court held that petitioners failed to state a claim, under the federal antitrust and racketeering laws, upon which relief could be granted. The district court accordingly declined to exercise pendent jurisdiction over the remaining state claims, and dismissed the case in its entirety.

The court of appeals affirmed, *NOW v. Scheidler,* 968 F.2d 612 (7th Cir. 1992) (Pet. A-1 to 37), and denied rehearing and rehearing en banc (Pet. G-1 to 2).

Petitioners sought review in this Court on their antitrust claim and two of their RICO counts (§§ 1962(c), (d)). This Court granted review limited to the RICO counts. *NOW v. Scheidler,* 113 S. Ct. 2958 (1993).

SUMMARY OF ARGUMENT

Petitioners are attempting to use the federal RICO statute as a weapon against social protest activities. This attempt must fail for at least three independent reasons.

1. Petitioners lack standing to bring RICO claims against respondents. The complaint alleges a laundry list of activities but fails to allege that *these particular respondents* committed any predicate acts which injured

these particular petitioners. Consequently, petitioners have failed to show either the "injury in fact" necessary to establish Article III standing or the "proximate causation" necessary to establish RICO standing.

2. RICO does not apply to social protest activities which lack any mercenary purpose whatsoever. Both the text and the manifest purpose of RICO show that Congress designed the statute to take the *profit* out of crime. RICO does not simply federalize or enhance the penalties for an arbitrary list of crimes designated as "racketeering activities." Rather, RICO targets *mercenary* criminal activity, as evidenced by the statutory title, statement of findings, definitions, prohibitions, and remedies.

3. Petitioners have failed to alleged the predicate acts necessary for a RICO claim. Social protest activities which neither "obtain property" nor employ "force, violence, or fear" simply do not constitute "extortion" under the Hobbs Act, 18 U.S.C. § 1951. Because petitioners have rested their entire RICO suit upon an over-expansive misreading of the Hobbs Act, the RICO claims in this case must fail.

This Court should affirm the judgment below which upheld the dismissal of petitioners' defective RICO suit.

ARGUMENT

The district court dismissed petitioners' RICO claims pursuant to Rule 12(b)(6), Fed. R. Civ. P. The court of appeals properly affirmed that dismissal, holding that respondents' alleged activities are "not within the reach of . . . RICO." 961 F.2d at 631. This Court should affirm the judgment of the court of appeals.[9]

---

[9] Affirmance follows regardless of whether the decision below is treated as a dismissal or a grant of summary judgment. *See* Brief of Respondent Murphy. A RICO Case Statement is not a pleading. Therefore, petitioners may not rely upon it, to compensate for defects in their complaint, when challenging a judgment of dismissal. If petitioners *do* wish to rely upon their RICO Case Statement, then that statement—and the judgment below—must be reviewed under the standards governing summary judgment.

I. PETITIONERS DWHO AND SUMMIT LACK STANDING.

The only claims before this Court are the RICO claims of petitioners DWHO and Summit,[10] under 18 U.S.C. §§ 1962(c) and (d),[11] against certain respondents.[12] DWHO and Summit lack standing, on the face of their complaint, to bring these claims against respondents.[13]

A. Petitioners Lack Article III Standing.

To maintain an action in federal court, a plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" and that this injury "fairly can be traced to the challenged action," *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) (internal quotation

---

[10] The National Organization for Women (NOW) was also a plaintiff in this case. NOW sued only under the federal antitrust statutes. Cplt. ¶¶ 79, 92-93 (J.A. 62, 64) (Count I). The lower courts rejected this claim. NOW petitioned this Court for review, Pet. at i (Question 2), but this Court denied review. NOW was not a plaintiff on any of the RICO claims. *See* Cplt. ¶¶ 94, 106, 111 (J.A. 65, 72, 74).

[11] Petitioners DWHO and Summit brought a claim under RICO section 1962(a), *see* Cplt. ¶¶ 94-105 (J.A. 65-72), but the lower courts rejected this claim. Petitioners did not seek review in this Court of that portion of the judgment below.

Petitioners DWHO and Summit also brought claims under state law. None of these claims sought relief against respondents Terry, Operation Rescue, or Project Life. The district court dismissed these claims without prejudice, and petitioners have not argued that this dismissal was erroneous.

[12] The complaint named respondents Scheidler, Scholberg, Murphy, PLAL, Terry, OR and Project Life as "RICO defendants" under § 1962(c) and (d). *See* Cplt. ¶¶ 94, 106, 111 (J.A. 65, 72, 74). The complaint named respondent Migliorino as a defendant under § 1962(c) but not under § 1962(d). *See id.* ¶¶ 106, 111 (J.A. 72, 74).

[13] Standing is a jurisdictional requirement which remains open to review at all stages of the litigation. *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 546-47 (1986).

marks and citations omitted). In other words, a plaintiff must show that the defendant (not someone else) violated a legal norm and that defendant's violation (not something else) caused injury to plaintiff (not to someone else).

This threshold minimum is a mandatory requirement of Article III of the Constitution. *Id.* Furthermore, a plaintiff bears the burden of establishing standing to sue. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986). The necessary showing "must affirmatively appear in the record," *id.* at 546 (footnote omitted); "it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings," *id.* at 547 (citations omitted).

Petitioners' complaint fails to satisfy this basic constitutional requirement.

1. No allegation by DWHO or Summit against Project Life

The complaint alleges no predicate acts whatsoever by respondent Project Life. Hence, petitioners lack standing to sue Project Life. (Petitioners acknowledged this in their RICO Case Statement, which omits Project Life as a RICO defendant. RICO Case Statement ¶ 1 (J.A. 87-88); *id.* Ex. A (J.A. 137).)

2. No allegations by DWHO or Summit against Terry or Operation Rescue

The complaint fails to allege that respondents Terry or Operation Rescue committed any predicate acts against petitioners DWHO or Summit.

The complaint sets forth a lengthy list of alleged predicate acts as the basis for the RICO claims under § 1962(c) and (d). *See* Cplt. ¶¶ 98 (J.A. 66-70) (listing predicate acts), 109 (J.A. 73) (incorporating, for § 1962(c) claim, ¶ 98 [14]), 111 (J.A. 74) (incorporating, for § 1962(d)

[14] The complaint actually lists the wrong paragraph number, viz., ¶ 99.

claim, ¶ 109). Of the twelve predicate acts listed, eight make no mention whatsoever of either DWHO or Summit. *See* Cplt. ¶ 98(a)-(f), (h), (i) (J.A. 66-69).

The four remaining alleged predicate acts make no mention of Terry or OR. *Id.* ¶ 98(g), (j)-(*l*) (J.A. 68-70).[15] Hence, petitioners lack standing to sue Terry and OR.[16]

---

[15] Paragraph 98(g) alleges an act by respondent Scheidler on his own; no conspiracy by any others is alleged. Furthermore, this incident predates the involvement of Terry and OR in the alleged "enterprise." According to the complaint, Terry first proposed Operation Rescue in November, 1986, *id.* ¶ 56 (J.A. 55), and OR was not organized until months later, *id.* ¶ 57 (J.A. 55). Scheidler's alleged act took place on April 12, 1986, i.e., prior to the involvement of Terry or OR in the alleged "enterprise." Accordingly, petitioners cannot hold respondents Terry or OR liable on any theory of "retroactive" conspiracy. *Levine v. United States*, 383 U.S. 265, 266 (1966) (per curiam) (individual cannot be held liable for substantive offenses committed by members of the conspiracy before that individual had joined the conspiracy).

Paragraphs 98(j)-(l) allege acts, attempts, and conspiracies by certain named respondents and others associated with them but specifically omit Terry and OR.

[16] Summit and DWHO lack standing to sue the other respondents as well.

Of the four remaining allegations, three refer to the theft and burial of aborted babies, while the fourth refers to an incident at DWHO involving respondent Scheidler. None of the alleged predicate acts even name respondent Scholberg.

1. *Aborted babies.* The "aborted babies" allegations allege three predicate acts against "clinics affiliated with plaintiffs DWHO and Summit," but allege no action against DWHO or Summit in particular. *Id.* ¶ 98(j)-(l) (J.A. 69-70). The only connection petitioners allege between these activities and petitioners is a statement, by respondent Migliorino, that 700 of the bodies came originally from Summit and another Milwaukee abortion business. *Id.* ¶ 71 (J.A. 59).

The alleged misconduct consisted of (a) stealing aborted babies from co-defendant Vital-Med, (b) publicizing the possession of these remains and the fact that the remains were labelled with names of facilities, physicians, and patients, and (c) conducting public funerals and burials for these aborted babies. *See also supra* note 8. Activity (a) is not directed at Summit or DWHO. Activities

B. Petitioners Lack RICO Standing.

Petitioners DWHO and Summit have failed, on the face of their complaint, to allege proximate causation between respondents' alleged violations of § 1962 and petitioners' asserted injuries. Thus, petitioners lack RICO standing, i.e., they fail to allege an injury within the scope of the RICO statute.

To bring suit under RICO, it is not enough to claim that the defendant violated § 1962 and that the plaintiff suffered injury. On the contrary, there must be a direct *connection* between the violation of RICO and the plaintiff's injury: "the plaintiff only has standing if, and can only recover to the extent that, he has been *injured* in his business or property *by* the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (emphasis added). As the RICO statute itself explicitly provides, only a "person *injured* in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefore . . . ." 18 U.S.C. § 1964(c) (emphasis added). This means that the plaintiff must allege and prove facts establishing that the RICO violation *proximately caused* the injuries plaintiff claims. *Holmes v. SIPC*, 112 S. Ct. 1311 (1992).

For their claims under § 1962(c) and (d) (the only claims before this Court), DWHO and Summit specify the alleged injuries in their complaint. *See* Cplt. ¶¶ 104-05

(b) and (c) are protected forms of speech. Hence, these incidents are insufficient bases for standing.

2. *Threat of "reprisals."* The only remaining alleged predicate act alleges that respondent Scheidler threatened DWHO's administrator with "reprisals" if she did not quit working at DWHO, *Id.* ¶ 98(g) (J.A. 68). DWHO does not allege that this "threat" injured DWHO in any way. On the contrary, DWHO acknowledges that the administrator remained at her job for a full year afterwards. *Id.* ¶ 44 (J.A. 50-51). Nor is an ambiguous allegation of threatened "reprisals" sufficient to show anything beyond the bounds of protected free speech. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982) ("threats" of "social ostracism, vilification, and traduction"). Furthermore, petitioners allege no conspiracy; hence, this alleged "threat" implicates no one aside from Scheidler.

(J.A. 72) (injury under § 1962(a)), 110 (J.A. 73) (incorporating injury set forth in ¶¶ 104-05 for § 1962(c)), 114 (J.A. 74) (incorporating injury set forth in ¶¶ 104-05 for § 1962(d)). These paragraphs provide as follows:

> 104. Each defendant's violation of 18 U.S.C. § 1962(a) has injured the business and/or property interests of the plaintiffs and the class members. The RICO Defendants' investment of income received from the pattern of racketeering activity or the proceeds therefrom has injured plaintiffs by furthering those illegal goals of PLAN, and/or PLAL, OR or the Project which involve extortionate and anti-competitive activities against abortion providers.
>
> 105. Specifically, the RICO Defendants' activities have decreased the business of and/or increased the cost of doing business at, DWHO, Summit and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the right to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.

The injury asserted in ¶ 104 relates exclusively to respondents' "investment of income"—i.e., petitioners' § 1962(a) claim—and thus has no relevance to the § 1962(c) and (d) claims at issue here.

The second sentence of ¶ 105 asserts injury to NOW and the class it claimed to represent. Neither NOW nor this class, however, are RICO plaintiffs.[17]

The allegation upon which the standing of DWHO and Summit ultimately rests, then, is the assertion that respondents' "activities have decreased the business of,

---

[17] To the extent that this allegation is taken as claim of direct injury to DWHO and Summit by decreasing their business, it is subsumed under petitioners' explicit allegation to this effect, discussed below.

and/or increased the cost of doing business at, DWHO [and] Summit . . . ." *Id.* ¶ 105 (J.A. 72).

Petitioners have not alleged as predicate acts actual blockades of DWHO and Summit or actual property destruction at DWHO and Summit. Rather, as discussed *supra* § I(A), petitioners have alleged such acts only at *other* abortion businesses.

Petitioners contend that these rescue blockades *elsewhere* have induced insurance companies to raise premiums, and induced landlords, security services, and laboratory facilities to charge higher rates, *for DWHO and Summit.* Cplt. ¶ 87 (J.A. 63). *See also* RICO Case Statement ¶ 15 (J.A. 112). Petitioners may also argue that respondents' activities *elsewhere* have induced women not to patronize *DWHO and Summit.*

These contentions do not show proximate cause. DWHO and Summit cannot sue respondents for blockading *other* abortion businesses any more than Operation Rescue can sue pro-abortion vandals for damaging the offices of *other* pro-life groups. Whether market forces in fact translate these third-party incidents into increased costs for petitioners is beside the point. "Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendants' acts was generally said to stand at too remote a distance to recover." *Holmes,* 112 S. Ct. at 1318 (citation omitted).

As this Court explained in *Holmes,* there are very powerful practical reasons for adhering to the traditional limits of proximate causation. If businesses which were not directly harmed were allowed to sue for indirect injuries,

> the district court would first need to determine the extent to which [plaintiffs' alleged harm] was the result of the alleged [RICO violation], as opposed to, say . . . poor business practices or their failures to anticipate developments in the [relevant] markets.

> Assuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the [directly injured non-parties] and the [plaintiffs], who would otherwise each be entitled to recover the full treble damages. Finally, the law woud be shouldering these difficulties despite the fact that those directly injured . . . could be counted on to bring suit for the law's vindication.

Id. at 1320. Limiting standing to those who show proximate causation is entirely compatible with RICO:

> the congressional admonition that RICO be "liberally construed to effectuate its remedial purposes," . . . does not deflect our analysis. There is, for that matter, nothing illiberal in our construction: We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that [indirectly injured parties] are not proper plaintiffs. Indeed, we fear that RICO's remedial purposes would more probably be hobbled than helped by [plaintiff's] version of liberal construction: Allowing suits by those injured only indirectly would open the door to massive and complex damages litigation which would not only burden the courts, but also undermine the effectiveness of treble-damages suits.

Id. at 1321 (editing marks and citations omitted).

Neither DWHO nor Summit has alleged any injury flowing from predicate acts directed toward DWHO or Summit.[18] Thus, DWHO and Summit lack RICO standing.

---

[18] *See supra* note 16. Again, petitioners allege no act whatsoever by respondents Terry or OR at or against either DWHO or Summit.

Summit alleges that respondent Migliorino illegally induced Summit's landlord to breach Summit's lease. Cplt. ¶¶ 77-78, 124-29 (J.A. 61-62, 77-78). Summit sued Migliorino for this under state law in a pendent tort claim, *id.* ¶ 123 (J.A. 77), but did not allege this as

In sum, petitioners DWHO and Summit lack standing under both Article III and the RICO statute to prosecute their claims under § 1962(c) and (d). This Court should accordingly dismiss the writ of certiorari as improvidently granted or, in the alternative, affirm the judgment of the court of appeals.

II. PETITIONERS' RICO CLAIMS MUST FAIL BECAUSE RESPONDENTS' ACTIVITIES REFLECT NO MERCENARY PURPOSE.

The court below affirmed the dismissal of this case on the basis that respondents' activities lacked a mercenary purpose and thus fell outside the purview of RICO. That decision was entirely correct, and this Court should affirm.

Petitioners and their amici have focused virtually all of their arguments on this question. It is therefore important, at the outset, to dispose of several preliminary matters.

First, the question whether RICO applies to defendants who act without any mercenary purpose at all is a non-issue *in this case.* Petitioners have exclusively alleged, as predicate offenses, "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Whereas extortion is a classic "property crime," the Court has no occasion to reach the RICO issue: if petitioners had truly alleged (which they have not) that respondents *obtained* (or

---

a predicate act under RICO. Hence, this incident cannot supply standing under RICO.

Petitioners' RICO Case Statement asserts that on May 10, 1986, respondent Migliorino took part in a blockade at Summit. J.A. 121. (This is the only blockade of either Summit or DWHO which appears anywhere in the RICO Case Statement.) This allegation does not appear in the complaint, either as an alleged predicate act or otherwise.

Neither of the foregoing incidents allege any involvement by respondents Terry, OR, or Project Life. Furthermore, the Migliorino blockade predates the alleged involvement of Terry, OR, or Project Life with the other respondents. *See supra* note 15.

conspired or attempted to obtain) *property* by extortion, then respondents' mercenary purpose would be clear; on the other hand, if petitioners in fact have not alleged that respondents obtained (or conspired or attempted to obtain) property by extortion, then there are no predicate acts to support petitioners' RICO claims. In either event, it is unnecessary to decide whether RICO applies to totally non-mercenary activities.[19] For this reason, as well as petitioners' lack of standing, *supra* § I, this Court should dismiss the writ of certiorari as improvidently granted.

Second, the argument that courts should not "invent" additional nontextual requirements for RICO is a red herring. "Just as we are not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the broad scope its language and origins may require, . . . so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it." *Ngiraingas v. Sanchez*, 495 U.S. 182, 192 (1990) (editing marks and citations omitted). In particular, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1172 (1993).

The text of RICO confirms the wisdom of the decision below. *Infra* § I(A)(2). To ignore the *connotations* of statutory language and the *context* of a statute would be to *frustrate*, not further, the purpose of Congress. For example, just because the text of the statute does not use the magic phrase "proximate causation," this does not mean that RICO claims face no such requirement. *See Holmes v. SIPC*, 112 S. Ct. 1311 (1992). Nor does the

[19] Petitioners, perhaps sensing this major logical gap in the pertinence of their arguments, attempt to preserve the RICO issue by reference to "arson" and "bombing," offenses which do not *ipso facto* demonstrate a mercenary purpose. *E.g.*, Pet. Br. at 4. This device fails: petitioners have not alleged any predicate arson or bombing by respondents. *See infra* § III(A).

absence of the phrase "operation or management" preclude the recognition of such a test for determining what constitutes "conduct" of an enterprise in violation of RICO. *See Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993).[20]

The true question is what interpretation of the text most faithfully implements the purpose of Congress. *Commissioner v. Engle*, 464 U.S. 206, 217 (1984); *United States v. Alpers*, 338 U.S. 680, 681-82 (1950) ("The most important thing to be determined is the intent of Congress"). It is that question to which respondents now turn.

A. RICO Does Not Apply to Social Protest Activities Undertaken Without Any Mercenary Purpose.

This Court has already recognized the danger that over-eager litigants will try to stretch statutory language "to apply RICO to new purposes that Congress never intended." *Reves*, 113 S. Ct. at 1172. That is precisely what petitioners are doing when they seek to convert RICO into a weapon against social protest.

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted). *Accord United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 113

[20] This Court has applied this same common-sense approach to statutes containing far fewer textual indications than are found in RICO. Thus, this Court has construed 42 U.S.C. § 1983 to include a defense of "qualified immunity," even though no such words appear on the face of the statute. *E.g., Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("Although the statute on its face admits of no immunities, we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them") (internal quotation marks and citation omitted). Neither "rule of reason" nor "Noerr-Pennington doctrine" appear in the text of antitrust laws; yet these are accepted statutory glosses. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Countless other examples could be cited.

S. Ct. 2173, 2182 (1993). Both the manifest purpose and the text of RICO demonstrate its inapplicability to social protest activities which lack any mercenary purpose.

1. *This Court's view of the purpose of RICO*

Petitioners appear to operate on the premise that the purpose of RICO was simply to federalize, or enhance penalties for, an arbitrary list of crimes designated as "racketeering activities." *See* Pet. Br. at 23-25 (equating violation of RICO with violation of predicate offenses). This premise is false.[21]

The purpose of RICO, as this Court has repeatedly acknowledged, was to strike at the "source of economic power" of organized crime. *Russello v. United States*. 464 U.S. 16, 27 (1983) (internal quotation marks and citation omitted). Whereas, "in the view of Congress, the economic power of organized crime derived from its huge illegal *profits*," *Russello*, 464 U.S. at 28 (emphasis added, citation omitted), it was only natural that Congress should target the corrupt acquisition of funds: "Congress could not have hoped successfully to attack organized crime's economic roots without reaching racketeering *profits*. During the congressional debates, the sources and magnitude of organized crime's *income* were emphasized repeatedly." *Id.* (emphasis added, citations omitted). *See United States v. Turkette*, 452 U.S. 576, 591-93 & n.14 (1981) (documenting purpose of targeting criminal revenue). Thus, "[t]he aim [of civil RICO remedies] is to divest the [defendant enterprise] of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585. Contrary to petitioners, Pet. Br. at 23-25, "Congress fully recognized that racketeers do not engage in predicate acts *as ends in themselves*; instead, racketeers threaten, burn, and murder in order to induce their victims to act in a way that accrues to the *economic benefit* of the racketeer . . . ."

---

[21] If petitioners' reductionist view of RICO were correct, the entire complex statutory scheme of "patterns," "enterprises," etc. would be no more than so many obstacles to the maintenance of successful actions under RICO.

Sedima, 473 U.S. at 519 (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting) (second emphasis added). Hence, Congress targeted crimes in which "the racketeer engaged in criminal acts in order to accomplish a commercial goal . . . ." *Id.* at 517. "The broader goal was to remove the *profit* from organized crime by separating the racketeer from his *dishonest gains.*" *Russello,* 464 U.S. at 28 (emphasis added).

RICO is a statutory weapon crafted to remedy the acquisition of economic power by means of serious criminal behavior (the predicate acts). To use RICO in the entirely different context of social protest would be like using a front-loader to weed a garden.

Where, as here, the protest activities of the RICO defendants have no mercenary purpose, use of RICO represents abuse of RICO.

2. *The statutory language*

The text of RICO represents an elaborate—and deliberate—statutory framework targeting mercenary criminal activities. The statute has no application to activity that lacks any mercenary purpose.

a. *Enterprise*

The RICO statute in 18 U.S.C. § 1962(c) forbids "any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate commerce, to conduct or participate . . . in the conduct of such *enterprise's* affairs through a pattern of racketeering activity . . ." (emphases added). The concept of "enterprise" within the meaning of RICO requires at least some economic purpose or profit-seeking activity on the part of the RICO defendants.

RICO does not define the term "enterprise" explicitly. Instead, the statute merely provides that " 'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). By using the

term "includes" instead of "means," Congress clearly indicated that not *every* individual, partnership, and so forth qualifies *per se* as an enterprise. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-38 (1989) (analyzing the term "pattern" in RICO) (by using a word other than "means" in a definition, the RICO statute "assumes that there is something to [the defined term] *beyond* simply the [elements set forth in the definition]") (emphasis in original).

The "enterprise" concept would be superfluous if *every* person, legal entity, or association automatically qualified as an enterprise. Congress was perfectly capable of using a word like "entity" or some other generic term having no commercial connotations, but chose instead to use the term "enterprise." Fidelity to legislative intent requires this Court to take this choice of terminology seriously.

In analyzing the term "enterprise," this Court "must start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *H.J. Inc.*, 492 U.S. at 238 (internal quotation marks and citations omitted). This is especially true when the statute itself "does not identify . . . [the] additional prerequisites for establishing the existence" of the statutory element. *See id.*

An "enterprise," according to Webster's Third New International Dictionary (1986), can *in the abstract* be any plan, design, or undertaking. *Id.* at 757. Petitioners seize upon this definition. Pet. Br. at 21-22. But RICO clearly does not incorporate *this* meaning of "enterprise"; the statutory definition includes *entities*, not mere "activities" or "designs." The first *concrete* definition given for an enterprise is as follows: "a unit of economic organization or activity (as a factory, a farm, a mine); *esp*: *a* business organization: FIRM, COMPANY." *Id.* (definition 1(c)). This economic connotation also appears in such uses as "Acme Enterprises" or the term "enterpriser," i.e., an "entrepreneur," defined as "the organizer of an

economic venture; *esp*: one who organizes, owns, manages, and assumes the risks of a business . . . ." *Id.* at 757 (definition of "enterpriser"), 759 (first definition of "entrepreneur").

Congress has also defined "enterprise" in a different statute, the Fair Labor Standards Act. That statute provides as follows: " 'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons *for a common business purpose* . . . ." 29 U.S.C. § 203(r)(1) (emphasis added). This definition is helpful for at least two reasons. *First,* this statute confirms congressional intent to adopt the ordinary connotation of "enterprise" as something having a profit-seeking purpose. *See e.g., Gollust v. Mendell,* 111 S. Ct. 2173, 2179 (1991) (congressional intent to adopt common understanding of a term is confirmed by use of the same word with that same meaning in other federal statutes). *Second,* this statutory definition of "enterprise" existed prior to the passage of RICO. *See Brennan v. Arnheim & Neely, Inc.,* 410 U.S. 512, 516-17 (1973) ("enterprise" concept added to FLSA in 1961). Congress is presumed to legislate with an awareness and understanding of the current meaning of the terms of existing laws. *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990).

Other provisions of RICO further bolster this conclusion by indicating that the term "enterprise" must mean an undertaking in which one can "invest" by acquiring an "interest" in or funding the "establishment or operation" of the enterprise, *see* 18 U.S.C. § 1962(a), (b), and that an enterprise is something which can accrue or produce income for the racketeer, *see* 18 U.S.C. § 1963(e). The plain implication of the text, then, is that an "enterprise" under RICO must, at least in part, pursue some *economic* goal. "We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections." *Sedima,* 473 U.S. at 489 (footnote omitted).

b. *Title, preface, definitions, remedies*

There are other textual indicators which confirm the Congressional understanding that RICO targeted *mercenary* criminal activity, not social or political protest.

First, the title of the statute, "Racketeer Influenced and Corrupt Organizations," serves as an "aid in showing what was in the mind of the legislature," *United States v. Palmer,* 16 U.S. (3 Wheat.) 610, 631 (1818). The terms "racketeer" and "corrupt" connote mercenary purposes. "Racketeer" means "A person who *makes money* by violations of racketeering laws." *Black's Law Dictionary* 1132 (5th ed. 1979) (emphasis added). "Racket," in turn, means "Engaging in an operation to *make money* illegitimately . . . ." *Id.* (emphasis added). *See also Webster's Third New International Dictionary* 1871 (1986) ("racketeer" is "one who extorts money or advantages . . ."). "Corrupt," meanwhile, indicates a purpose of illegitimate profiteering. *See Black's Law Dictionary, supra,* at 311 ("corruptly," when used in a statute, "generally imports a wrongful design to acquire some pecuniary or other advantage").

Second, the Congressional findings prefacing RICO confirm this understanding. These findings, quoted at length in *United States v. Turkette,* 452 U.S. 576, 588-89 (1981), explicitly identify the evil which RICO seeks to remedy: "organized crime derives a major portion of its power through *money obtained* from . . . illegal endeavors"; these mercenary endeavors "drain billions of dollars from America's economy" into the pockets of racketeers who then use "this money and power . . . to infiltrate and corrupt" businesses, unions, and government bodies, producing significant additional harm to the economy of the nation. *Id.* at 588 (internal quotation marks and citation omitted). The declared purpose of the RICO legislation was clearly to deny racketeering activity "the fruits of its ill-gotten gains." *Id.* at 585.

Third, only a "person" can violate RICO, § 1962, and "person" includes only an individual or entity "capable of holding a legal or beneficial interest in property," § 1961(3). This limitation would make no sense if a violation of RICO bore no relation to the illegal *acquisition of property*.

Fourth, the statutory remedies RICO provides—forfeiture, 18 U.S.C. § 1963, and treble damages and attorney fees, 18 U.S.C. § 1964(c)—clearly indicate a desire to strike at *mercenary* criminal activity. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987) (RICO provides "broad and flexible remedies" against the "business activities" of organized crime) (internal quotation marks and citations omitted). Statutory weapons designed to take the profit out of racketeering simply makes no sense in the context of purely social, political, or religious protest movements.

3. *Workability*

The United States claims that using RICO only against mercenary criminal activities could impair prosecution of political and religious terrorism. U.S. Br. at 1-2. But the former RICO Guidelines of the Justice Department itself explicitly barred any indictment charging an "association in fact" as an enterprise " 'unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic goal . . .*,' " *United States v. Ivic*, 700 F.2d 51, 64 (2d Cir. 1983) (emphasis in *Ivic*) (quoting Guideline VI) (superseded in 1984, *see* U.S. Br. at 17). The United States has cited no instance in which the government has been unable, under *other* statutes, adequately to prosecute criminal social protest activities that were devoid of mercenary purposes.

This statutory requirement of at least some financial purpose is not a judicially created obstacle to the proper functioning of RICO. Rather, as the Seventh Circuit recognized in this case, "this interpretation of § 1962(c) is

dictated by the terms of the statute," 968 F.2d at 629. The mercenary purpose requirement does no more than recognize the fundamental difference between schemes which engage in racketeering and corruption, even as a sidelight, *e.g.*, *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840, 917 (1983) (extorting payments from moderate Croatians as a means of furthering predominant nationalist political goals), from movements which address exclusively political or social goals and, while breaking some laws, commit no "economic" crimes, *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights activism included violent incidents).

The requirement of a mercenary purpose marks the essential boundary between social protest and criminal corruption.[22] As such, this requirement has already long served, without any apparent practical enforcement difficulty, in the context of the Hobbs Act. As this Court has observed, the "entire character" of a protest "change[s] from legality to criminality" when the protest is used "to exact the payment of money as a condition of its cessation." *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (editing marks and citation omitted). "In short, when the *objectives* of the [protest activities] change[] from legitimate . . . ends to personal payoffs," then the actions become corrupt and criminal. *Id.* (emphasis added). To recognize a requirement of a mercenary purpose in RICO is to do no more than to acknowledge this same crucial distinction.

As the court below observed, the question whether the enterprise is "geared toward economic gain," 968 F.2d at 628, requires no "vague, amorphous" inquiry, *id.* at 629.

---

[22] Petitioners' supposed list of contrary cases is specious. Pet. Br. at 37. Aside from the abortion protest cases, the decisions petitioners cite all involved economic crimes like robbery, bribery, and illegal gambling.

Nor need a court inquire as to subjective motivations.[23] Rather, the economic purpose requirement posits a straightforward, bright-line test: Is there *any* mercenary purpose? The crucial distinction is between "some" and "none"—between something and nothing—and that is all the difference in the world.[24]

B. Respondents' Activities Reflect No Mercenary Purpose.

The court of appeals applied the mercenary purpose requirement to the facts of the case at bar and correctly concluded that petitioners' complaint failed to satisfy this statutory requisite. 968 F.2d at 630.

In the instant case, petitioners have alleged no mercenary purpose whatsoever on the part of respondents. Petitioners point to the fact that respondent organizations receive third-party donations to support their work and that some of the individual respondents receive salaries or

---

[23] Petitioners make much of the term "motivation" in the opinion below. However, it is clear in context that this term must refer to objective goals, not subjective desires.

[24] The circuits that have actually addressed the relevant issue—the Second and Eighth—are in harmony with the Seventh Circuit. *See United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *United States v. Bagaric*, 706 F.2d 42, 53, 55 (2d Cir.), *cert. denied*, 464 U.S. 840, 917 (1983); *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1983); *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988) ("For purposes of RICO, an enterprise must be directed toward an economic goal") (citing *Ivic*). *See generally* Brief in Opp. of Respondents Terry, *et al.* at 8-10.

The district courts that have addressed this issue since the Seventh Circuit ruled in this case have uniformly followed that decision. *See Town of West Hartford v. Operation Rescue*, 792 F. Supp. 161, 168-69 (D. Conn. 1992), *vacated on other grounds*, 991 F.2d 1039 (2d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3093 (U.S. July 19, 1993) (No. 93-126); *Webster v. Operation Rescue*, No. 91-C-20138 (N.D. Ill. Oct. 9, 1992) (1992 WL 281366); *Lucero v. Operation Rescue of Birmingham*, No. CV91-PT-1082-S (N.D. Ala. Mar. 2, 1993); *Women's Pavilion, Inc. v. Moriarty*, No. 3:91CV7250 (N.D. Ohio Dec. 23, 1992).

in-kind benefits (e.g., use of a car) from these organizations. Cplt. ¶ 100 (J.A. 71). But as the Seventh Circuit held, "it is not reasonable to infer that the purpose of the [petitioners' alleged conduct] is to raise funds" simply because that conduct "results incidentally in donations to support it," *id.*

Petitioners also argue that the negative economic *effect* on abortion businesses allegedly resulting from respondents' activities satisfies the economic *purpose* requirement. Pet. Br. at 45. This contention is patently meritless, as it "renders the distinction between 'purpose' and 'effect' utterly meaningless." *Bray v. Alexandria Women's Health Clinic,* 113 S. Ct. 753, 767 (1993).

The fact that an organization is donor-supported, or that it pays its employees or agents, simply has no connection at all to the legality of its activities or its liability under RICO. The court of appeals therefore correctly held that respondents had no mercenary purpose that would bring them within RICO.

III. PETITIONERS HAVE FAILED TO ALLEGE ANY PREDICATE ACTS UNDER RICO.

The Seventh Circuit rejected petitioners' RICO claims under 18 U.S.C. § 1962(c) and (d) for failure to satisfy the economic purpose requirement of RICO. Petitioners urge this Court to construe RICO not to require *any* economic purpose whatsoever. Pet. Br. § I. But even if this Court were to do so, this would not help petitioners. Petitioners' complaint fails to state a RICO claim for an additional, wholly independent reason: a complete absence of the necessary "predicate acts."

A respondent—as the prevailing party in the court below—"may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon,* 457 U.S. 132, 137 n.5 (1982). This is true "whether or not that ground was relied upon or even considered by the trial court," *Dandridge v. Williams,* 397 U.S. 471, 475 n.6 (1970), or even if "his argument may involve an attack upon the reasoning of the lower court or an insist-

ence upon matter overlooked or ignored by it." *Id.* (internal quotations marks and citation omitted). If petitioners have not properly pleaded any RICO predicate acts, then there is no RICO cause of action and therefore no need to determine whether the enterprise itself or the predicate acts require an economic purpose. Hence, this issue is a "predicate to an intelligent resolution" of the petitioners' RICO claim. *Cuyler v. Sullivan,* 446 U.S. 335, 342 n.6 (1980) (internal quotation marks and citation omitted).

Each subsection of the RICO statute requires proof of a "pattern of racketeering activity." 18 U.S.C. § 1962(a), (b), (c). A "pattern" of racketeering activity "requires at least two acts of racketeering activity," 18 U.S.C. § 1961(5). The necessary acts of racketeering must in turn come within RICO's definition of "racketeering activity," 18 U.S.C. § 1961(1), which lists the offenses that qualify as predicate acts. Thus, a RICO plaintiff must allege at least two "predicate acts" that fall within the RICO definition of "racketeering activity." Petitioners have failed to do so.

A. Petitioners Cannot Rely Upon Insinuations of "Arson" or "Bombing."

Amicus United States suggests that "arson" and "bombing" might serve as predicate offenses to support petitioners' RICO suit. Brief for United States at 21-22. This suggestion is meritless:

—Petitioners did not allege *any acts* of arson or bombing by respondents in their complaint. In fact, petitioners did not allege arson or bombing *at all,* much less arson or bombing *by respondents.*

—Petitioners did not allege either arson or bombing *as a predicate act.*

—Even in the RICO Case Statement, which lists arson and bombing by non-parties, petitioners did not allege either arson or bombing *as a predicate act.* The only predicate acts alleged are acts of Hobbs Act extortion. J.A. 91, 95-96.

—Petitioners amended their complaint repeatedly but never sought to add arson or bombing as predicate acts. The reason is clear: respondents committed no such acts.

—"Bombing" in any event is not a predicate act under RICO. *See* 18 U.S.C. § 1961(1).

Petitioners therefore cannot salvage their RICO claim by this device.

B. Petitioners' Have Not Alleged Conduct which Constitutes Extortion under the Hobbs Act.

Petitioners rely exclusively upon allegations of "extortion" under the federal Hobbs Act, 18 U.S.C. § 1951. *See* Cplt. ¶¶ 97-98 (J.A. 66-70); RICO Case Statement ¶ 5(a), (f)(1) (J.A. 91, 95-97). Hobbs Act extortion does indeed qualify as a predicate act under RICO. *See* 18 U.S.C. § 1961(1). The conduct petitioners allege, however, does not make out even a *single* instance of extortion under the Hobbs Act, much less the minimum RICO requirement of *two* such acts.

The Hobbs Act, 18 U.S.C. § 1951, prohibits interference with commerce by "extortion," § 1951(a), and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." § 1951(b)(2). Petitioners' complaint of predicate extortion under the Hobbs Act fails if any one of the essential elements of this statutory offense is lacking. In this case, petitioners' claim is defective for at least three independent reasons: 1) no allegation of "obtaining"; 2) no allegation of "property"; and, (3) no allegation of actual or threatened "force, violence, or fear."

The complaint specifies fifteen supposed predicate acts of extortion. *See* Cplt. ¶ 98 (J.A. 66-70). The following chart lists the factual allegations corresponding to each alleged predicate act, and provides a brief description of the act in question. (Paragraphs refer to the Second Amended Complaint.)

Allegation of predicate act	Corresponding factual allegation	Description of act	
		Status	Substance
1. ¶ 98a	¶ 38	Attempt, conspiracy, commission	rescue blockade [25]
2. 98b	40	Conspiracy	rescue blockades
3. 98c	41	Conspiracy	"unlawful, concerted action"
4. 98d	42	Attempt, commission	"stormed the clinic" and injured two persons
5. 98e	42	Commission	"stormed the clinic," "ransacked a medical procedures room," and destroyed surgical supplies
6. 98f	47	Attempt, conspiracy, commission	rescue blockade
7. 98g	44	Attempt	threat of "reprisals" should administrator of abortion business not quit job
8. 98h	53	Attempt, conspiracy, commission	rescue blockade
9. 98i(1)	59, 63	Attempt, conspiracy, commission	rescue blockades
10. 98i(2)	60	Attempt, conspiracy, commission	rescue blockades

[25] A "rescue blockade" is a sit-in designed to prevent access to an abortion business. *See* Cplt. ¶¶ 38 (J.A. 48), 47 (J.A. 51).

Allegation of predicate act		Corresponding factual allegation	Description of act	
			Status	Substance
11.	98i(3)	61	Attempt, conspiracy, commission	rescue blockades, trespass, and assaults upon police officers
12.	98i(4)	62	Attempt, conspiracy, commission	rescue blockades
13.	98j	64-76	Attempt, conspiracy, commission	theft and concealment of fetal remains; publicizing and conducting funerals and burials of stolen fetuses [26]
14.	98k	69-76	Attempt, conspiracy	disclosure of identity of abortionists responsible for fetal remains; conducting and publicizing fetal funerals
15.	98l	64-76	Attempt, conspiracy	theft, concealment, and transport of fetal remains; threat to disclose identity of abortionists; publicizing and conducting funeral Masses and burials for stolen fetuses [27]

[26] *See supra* note 8.

[27] *See supra* note 8.

These alleged acts do not constitute federal criminal extortion.

1. *The missing elements*

a. *No allegation of "obtaining"*

Violation of the Hobbs Act requires "the *obtaining* of property *from* another . . . ." 18 U.S.C. § 1951(b)(2) (emphasis added). Petitioners have alleged no "obtaining" in this case.

i. *Plain meaning of "obtaining"*

The plain meaning of "obtaining . . . from" includes more than merely making someone "give up" something. Yet the latter is all that petitioners have alleged.

It is a fundamental rule of interpretation to begin with the text of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). Words are to be given their ordinary meaning. *Russello v. United States,* 464 U.S. 16, 21 (1983). The Oxford English Dictionary, vol. 10, 669-70 (2d ed. 1989), traces the development of the uses of "obtain" through the history of the English language. Its principal sense is "to come into the possession or enjoyment of (something) . . . . to acquire [or] get." *Id. Accord Black's Law Dictionary* 972 (5th ed. 1979) ("obtain" means "[t]o get hold of . . .; to get possession of; to procure; to acquire in any way"). "Obtaining . . . from" is not synonymous with "part with," which means "to let go, *give up* [or] surrender." *Oxford English Dictionary,* vol. 11 at 262 (emphasis added). Yet in the present case, petitioners alleged no more than that respondents

> did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics *to give up* their jobs; doctors involved with affected clinics *to give up* their economic right to practice medicine at the plaintiff clinics; patients of affected clinics *to give up* their right to obtain services at the plaintiff clinics; and prospective patients of clinics *to give up* their constitutional right to decide whether and where to ob-

tain medical services free from fear of violence or threatened or actual force.

Cplt. ¶¶ 97, 98(d) (J.A. 66, 67) (emphasis added). Petitioners have not pleaded that respondents (or anyone associated with them) "obtained" anything.

ii. *Meaning of "obtaining" under New York extortion law*

Under New York law—the source of the language of the Hobbs Act—"obtaining" means "gaining," not just denying." *United States v. Enmons,* 410 U.S. 396, 406 n.16 (1973).

The Hobbs Act took its relevant language from the extortion law of the state of New York. *Id.; Evans v. United States,* 112 S. Ct. 1881, 1886 n.9, 1887 (1992). Under New York law, it is well-settled that the crime of extortion requires an unlawful taking. *Enmons,* 410 U.S. at 406 n.16 (under New York statute, "extortion requires an intent to *obtain* that which in justice and equity the party is not entitled to *receive*"; accused must be "actuated by the purpose of *obtaining a financial benefit*" such as "receiv[ing] a payoff") (emphasis added; quoting and citing New York cases). *See People v. Whaley,* 6 Cow. 661, 663 (N.Y. 1827) ("[e]xtortion . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865, § 613 (extortion)). *People v. Ryan,* 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921) (blackmail prosecution) (an intent "to extort" requires an accompanying intent to "gain money or property"; mere threat to injure a business is insufficient). *See also People v. Squillante,* 18 Misc. 2d 561, 564, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959) (" '[o]btaining of property from another' imports not only that he give up something but that the obtainer receive something"); *United States v. Nedley,* 255 F.2d 350, 355-58 (3d Cir. 1958).[28]

---

[28] In *Nedley,* the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous with "taking" and that "robbery in the Hobbs Act did *not* extend to "interference by force and violence with . . . lawful dominion and control,"

New York law was codified in the Field Code of 1865, which defined extortion as "[t]he *obtaining of property* from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." FIELD CODE § 613 (1865) (emphasis added). In the commentary to Chapter IV, Section 584 (larceny), the Field Code Commissioners observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement. . . . *All four include the criminal acquisition of the property of another.* . . . In extortion, there is again a taking. . . . Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.

FIELD CODE, Chapter IV, § 584 com. (emphasis added).

The Field Code, in turn, was one of the sources for the Hobbs Act. *Evans,* 112 S. Ct. at 1886 n.9.

iii. *Meaning of "obtaining" at common law: extortion vs. coercion*

Furthermore, petitioners' theory of "extortion" is completely inconsistent with the distinction at common law—incorporated into the Hobbs Act—between "extortion" and "coercion."

"Coercion" is the criminal compulsion of another, by means of threats, to do or not do something. *See* 31A Am. Jur. 2d *Extortion, Blackmail, and Threats* §§ 49-50 (1989) (coercion as independent offense). Coercion is a creature of statute, much broader then extortion. *Id.* Extortion, by contrast, is limited to the *obtaining of property* by means of threat. *Id.* § 40. The "obtaining" element in the Hobbs Act incorporates this distinction.

It is a familiar "maxim that a statutory term is generally presumed to have its common-law meaning." *Taylor v. United States,* 495 U.S. 575, 592 (1990) (quoted in *Evans v. United States,* 112 S. Ct. 1881, 1885 (1992)). As this Court reaffirmed in *Evans,*

---

since no "taking" or no "intent to steal" could be shown. 255 F.2d at 354-57.

> "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. at 1885 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

In *Evans*, this Court explicitly applied this rule to the terms of the Hobbs Act: "our construction of the statute is informed by the common-law tradition from which the term of art was drawn and understood." 112 S. Ct. at 1889. This "common-law tradition" demonstrates the flaw in petitioners' attempt to obliterate the distinction between extortion and coercion.

(a). *Extortion at common law*

Although the common law definition varied from treatise to treatise, extortion unquestionably was a *property* offense. Blackstone [29] described extortion as "an abuse of public justice, which consists in an officer's unlawfully *taking*, by colour of his office, from any man, *any money or thing of value*, that is not due to him, or more than is due or before it is due." 4 W. Blackstone, *Commentaries* 141 (1769) (emphasis added). In another influential treatise, Coke opined, "[e]xtortion, in its proper sense, is a great misprision, by wresting or unlawfully *taking* by any officer, by colour of his office, *any money or valuable thing* . . . either that is not due, or more than is due, or before it

---

[29] "The definition of common law extortion that writers on the Hobbs Act most frequently cite is Blackstone's . . . ." Lindgren, *The Elusive Distinction Between Bribery and Extortion; from the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 862 (1988).

be due . . . ." 3 E. Coke, *First Institute* 584 (J. Thomas ed. 1826) (emphasis added). Hawkins[30] stated,

> [E]xtortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the *taking of money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

W. Hawkins, *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788) (emphasis added).

In sum, the common law definition of extortion required the *acquisition of property*. The Hobbs Act, by employing the term "obtaining" from common law, New York law, and the Field Code, incorporated this same element.

(b). *Statutory distinction between extortion and coercion*

The Model Penal Code maintained the distinction between the (originally common-law) crime of extortion and the (originally statutory) crime of coercion. Section 212.5 "prohibits specified categories of threats made with the purpose of unlawfully *restricting another's freedom of action* to his detriment." MODEL PENAL CODE § 212.5 cmt. 2 at 264 (1980) (emphasis added).[31] Section 223.4, however, "deals with situations where threat . . . is the method employed to *deprive the victim of his property*." *Id.* § 223.4 cmt. 1 at 201 (emphasis added). The obtaining of property distinguishes extortion from coercion, as

---

[30] "Hawkins's definition of extortion was cited, paraphrased, or followed by the *Crown Circuit Companion*, Mathew Bacon in *A New Abridgement of the Law*, William Russell in *A Treatise on Crimes and Misdemeanors*, and Francis Wharton in his influential American treatise, *A Treatise on the Criminal Law*." Lindgren, *supra* note 29, at 865 (footnotes omitted).

[31] "The word 'unlawfully' means that the actor must intend to coerce conduct that he has no legal right to require . . . . The phrase 'freedom of action' is intended to include anything which the other person does not wish to do or to refrain from doing." *Id.* at 265.

coercion involves the restriction of another's freedom of action by threat.

Many states follow the Model Penal Code and distinguish extortion and coercion by categorizing them as separate statutory offenses.[32] A second group of states recognize only the crime of extortion, not coercion.[33] Other states combine the two offenses under one heading.[34]

---

[32] *See* ALA. CODE §§ 13A-8-13, 13A-6-25 (1982); ALASKA STAT. §§ 11.41.520, 11.41.530 (1989); ARK. CODE ANN. §§ 5-36-103(a)(2), 5-13-208 (Michie 1987 & Supp. 1991); COLO. REV. STAT. ANN. § 18-3-207 (coercion labelled extortion), § 18-4-401 (consolidated theft) (West 1990); DEL CODE ANN. tit 11, §§ 846, 791 (Supp. 1992); MISS. CODE ANN. § 97-3-81 (extortion labelled robbery), § 97-3-87 (coercion labelled whitecapping) (1973); MONT. CODE ANN. §§ 45-6-301(2), 45-5-203 (1991); NEV. REV. STAT. ANN. §§ 205.320, 207.190 (Michie 1992); N.J. STAT. ANN. §§ 2C:20-5, 2C:13-5 (West 1982); N.Y. PENAL LAW §§ 155.05(2)(e) (McKinney 1988), 135.60 (McKinney 1987); N.D. CENT CODE §§ 12.1-23-02(2), 12.1-17-06 (1985); OHIO REV. CODE ANN. §§ 2905.11, 2905.12 (Anderson 1993); OR. REV. STAT. §§ 164.075, 163.275 (1990); 18 PA. CONS. STAT. ANN. §§ 3923, 2906 (Purdon 1983); WASH. REV. CODE ANN. §§ 9A.56.110, 9A.36.070 (1988).

[33] *See* ARIZ. REV. STAT. ANN. § 13-1804 (1989); CAL. PENAL CODE § 518 (1988); CONN. GEN. STAT. ANN. § 53a-119(5) (West Supp. 1993); GA. CODE ANN. § 16-8-16 (1992); IDAHO CODE § 18-2403(2)(e) (1987); ILL. ANN. STAT. ch. 38, para. 16-1(a)(3) (Smith-Hurd Supp. 1992); IND. CODE ANN. §§ 35-45-2-1, 35-43-4-1(b)(7) & 35-43-4-2 (Burns Supp. 1992); IOWA CODE ANN. § 711.4 (West 1979); KY. REV. STAT. ANN. § 514.080 (Baldwin 1984 & Supp. 1992); LA. REV. STAT. ANN. § 14:66 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 355 (1983); MD. CRIM. LAW CODE ANN. § 562B (1992); MO. ANN. STAT. § 570.030 (Vernon Supp. 1993); NEB. REV. STAT. § 28-513 (1989); N.H. REV. STAT. ANN. § 637:5 (1986); N.C. GEN. STAT. § 14-118.4 (1986); S.C. CODE ANN. § 16-17-640 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-30A-4 (1988); TEX. PENAL CODE ANN. § 31.03 (West 1989); UTAH CODE ANN. § 76-6-406 (1990); VA. CODE ANN. § 18.2-59 (1988); W. VA. CODE § 61-2-13 (1992).

[34] *See* FLA. STAT. ANN. § 836.05 (West 1976); HAW. REV. STAT. § 707-764 (1988); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 1990); MICH. COMP. LAWS ANN. § 750.213 (West 1991); MINN. STAT. ANN. § 609.27 (West 1987); N.M. STAT. ANN. § 30-16-9

Petitioners fail to recognize coercion as a separate offense. Yet "[t]he distinction is not trivial: . . . it is of the essence of extortion—not only in New York law but, more importantly, in the law generally—that one compel another to surrender *property*." *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1132 (E.D.N.Y. 1992) (emphasis in original) (citing *United States v. Nardello*, 393 U.S. 286, 296 (1969)).

Petitioners' allegations of extortion are limited to claims that abortion businesses, doctors or patients were deprived of the ability to exercise certain rights. But "to deprive" is simply not the same as "to obtain from." Respondents were not business competitors of the petitioners or their employees. They stood to gain nothing by the reduction in the petitioners' business. Even assuming, *arguendo*, that abortion businesses lost "property" because of respondents, *but see infra* § III(B), neither the respondents nor anyone associated with them *obtained* that "property." Nor did any third party gain "property." Thus, the crime of "extortion" simply does not fit the alleged conduct. Whatever else respondents might have been, they were not "extortionists." [35]

(1984); R.I. GEN. LAWS § 11-42-2 (Supp. 1992); TENN. CODE ANN. § 39-14-112 (1991); VT. STAT. ANN. tit. 13, § 1701 (Supp. 1992); WIS. STAT. ANN. § 943.30 (West 1982); WYO. STAT. § 6-2-402 (1988). *Cf.* KAN. STAT. ANN. §§ 21-3701(c) (theft by threat), 21-3428 (coercion and extortion together) (1988); OKLA. STAT. ANN. tit. 21, §§ 1481 (extortion), 1488 (coercion and extortion together under blackmail) (West 1983).

[35] The Third Circuit holding in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), that no economic benefit or motivation is necessary in pleading and proving a Hobbs Act violation, is clearly wrong. None of the decisions it cited supports its holding. *United States v. Cerelli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), merely held that the extortionist need not obtain the property himself—a political party may be the recipient of the extorted contributions. *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), held that a religious purpose does not preclude a finding of extortion where money is taken. Finally, *United*

A defendant may "obtain" property for purposes of the Hobbs Act either by *personally* receiving a direct payment from the victim or by obtaining property for *another* person. *United States v. Green*, 350 U.S. 415 (1956). In the case at bar, however, petitioners have alleged neither alternative. Petitioners have not alleged that respondents themselves either received or sought any benefit from any of the alleged victims of extortion. (The only "benefits" petitioners allege are donations and salaries which come, not from the alleged victims, but from independent sources.) Nor have petitioners alleged any attempt to coerce the transfer of any property to third parties.[38] Therefore respondents cannot, in any reasonable sense of the word, be guilty of "obtaining" any property.

b. *No allegation of "property"*

Violation of the Hobbs Act requires "the obtaining of *property*," 18 U.S.C. § 1951(b)(2) (emphasis added). Petitioners' complaint does not satisfy this requirement.

Petitioners identify, *inter alia*, the following supposed "property" extorted from the alleged victims: from patients, the "right to obtain services" at facilities that pro-

---

States v. Anderson, 716 F.2d 446 (7th Cir. 1983), dealt not with the "obtaining from" element of extortion, but with the failure to give kidnapping instructions. The record, however, included evidence that defendant had extorted $300 from the victim. *Id.* at 477. Curiously, the Third Circuit failed to cite its own controlling precedent recognizing that extortion under the Hobbs Act is a "larceny-type offense." *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)). *McMonagle*, in short, is unpersuasive. The court below referred to *McMonagle's* holding in passing, but without independently addressing this issue.

[38] Petitioners have alleged that certain "co-conspirators" themselves caused *damage* to the property of some abortion businesses. But vandalism alone—even intentional vandalism—is not extortion. Nor have petitioners themselves ventured so far as to allege that the property so damaged constitutes the property allegedly "obtained" by respondents. *See* Cplt. ¶ 97 (J.A. 66) (describing "property" allegedly extorted).

vide abortions; and from prospective patients, the "constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force." Cplt. ¶ 97 (J.A. 66).[37] These abstract "rights" of uncertain legal status do not constitute "property" for purposes of the Hobbs Act.

Any unlawful conduct, whether a tort, a breach of contract, or even a parking violation, will interfere to some degree with another person's liberty to do as he pleases. But the Hobbs Act forbids the wrongful obtaining of *property*, not the wrongful denial of *liberty*. To treat "rights" as "property" under the Hobbs Act would be to remove all limits whatsoever to the kind of injury necessary to rise to the level of federal criminal extortion.

This Court rejected a similar attempt to expand the concept of "property" beyond all meaning in the context of the federal mail fraud statute. *See McNally v. United States*, 483 U.S. 350 (1987). The mail fraud statute prohibited use of the mails for "obtaining money or property" by fraud. 483 U.S. at 352 n.1. In *McNally*, the government charged the defendant with defrauding Kentucky citizens "of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud . . . ." *Id.* at 354 n.4 (trial court's instruction to jury). This Court recognized an

[37] Petitioners also identified the following supposed "property" extorted: from employees, "jobs"; from doctors, the "economic right to practice medicine" at facilities that provide abortions. *Id.* To the extent that these allegations refer to the general "freedom . . . to engage in any of the common occupations of life," *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)), the allegations describe a *liberty* interest, not a property right. While employers can have property interests in continued employment *vis-a-vis* the employer, the respondents in this case neither employ abortion business staff or even seek their jobs for themselves. Nor have petitioners claimed that respondents sought to induce abortion businesses to fire their staff.

obvious difference between "property rights" and "the intangible right of the citizenry to good government." *Id.* at 356. Indeed, this distinction was so clear that the Court considered that the only "arguable" way of saving the prosecution would be to construe the mail fraud statute so as to dispense entirely with "the money-or-property requirement" for certain kinds of fraudulent schemes. *Id.* at 358. The Court refused to remove this statutory limitation: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the mail fraud statute] as limited in scope to the protection of property rights." *Id.* at 360.

Acceptance of petitioners' strained characterization of abstract "rights" as property would likewise leave the boundaries of the Hobbs Act highly ambiguous and would put the federal government in the business of enforcing order in domestic social movements. Did the civil rights activists of the 1960's extort owners of diners of "property" when they obstructed the owners' "right to serve only the customers they chose"? Did these activists extort white bus passengers of their "property" by making these passengers give up their "right to sit in the front of the bus"? Such convoluted abstractions do not constitute "property" under the Hobbs Act.

To ~~be sure, a pro~~perty right need not be tangible. *Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (mail fraud statutes apply to wrongful obtaining of intangible property). But "intangible property" does not equate with "intangible rights." A liberty interest such as the "right to obtain services" or the "constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force" is, in the words of *Carpenter*, "an interest too ethereal in itself to fall within the protection" of the "property" concept, *id.* at 25.

c. *No allegation of "force, violence, or fear"*

Conduct typical of civil disobedience—sit-ins, pickets, vehement rhetoric—does not constitute "force, violence, or fear" under the Hobbs Act. Petitioners have alleged no more than conduct of this sort;[38] hence, there can be no predicate extortion. *Accord Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102 (2d Cir. 1990) ("it would be difficult to construe the [anti-abortion rescuers'] activities as described in the complaint, consisting of resistance to police efforts to clear protestors from the [abortion business] . . ., as the 'wrongful use of actual or threatened force, violence or fear' within the meaning of section 1951(b)").

In the case at bar, petitioners have sought to characterize a quintessentially social, moral, and political battle as "extortion." This semantic legal endeavor is flawed not only as a matter of statutory construction, but also as a fundamental matter of jurisprudence. As the sponsor of the Hobbs Act noted, the words "robbery" and "extortion" "have been construed a thousand times by the courts. Everybody knows what they mean." 91 Cong. Rec. 11912 (1945) (quoted in *United States v. Culbert*, 435 U.S. 371, 378 (1978)). Petitioners' artificial and unbounded construction of the Hobbs Act, like the prosecutor's attempted expansive reading of that same Act in *McCormick v. United States*, 111 S. Ct. 1807, 1816 (1991), is "an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent . . . ."

---

[38] Arson and bombing would represent examples of force or violence; however, petitioners have alleged no such predicate acts. *Supra* § III(A). Petitioners have alleged a solitary incident of apparent assault by persons who are not defendants in this case. Cplt. ¶ 42 (J.A. 50). But petitioners have alleged no connection to respondents that would support legal liability for this isolated incident. One person "certainly . . . cannot" be held liable for the acts of another "simply because both shared certain goals." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 n.69 (1982) (citation omitted).

For forty years after the passage of the Hobbs Act of 1948, not a single reported decision suggested that the pursuit of social, moral, or political goals through pressure tactics—including lawbreaking in the form of trespass, obstruction, mass picketing, and incidental scuffling—constitutes federal criminal extortion. The isolated and aberrant decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), cannot have singlehandedly revolutionized American jurisprudence.

Civil disobedience and social or political pressure tactics are "as American as apple pie," and characterizing ideological movements as extortionate simply because of the use of these traditional methods would move this country precisely in the direction of totalitarian oppression so recently abandoned in the former Soviet Union. The theory of petitioners' complaint would make a racketeer and an extortionist out of everyone from Mohandas Gandhi, to Martin Luther King, Jr., to the temperance activists of the Nineteenth Century (*see* decision below, 968 F.2d at 619-20), to the leaders of the Boston Tea Party. Petitioners' construction of RICO and the Hobbs Act would distort these statutes into weapons for combatting anti-nuclear protestors, animal rights activists, and opponents of apartheid. Indeed, some of petitioners' amici not only recognize but positively *welcome* this prospect. *See* Brief of the American Medical Ass'n et al. at 3-4, 22-23. But as the Ninth Circuit declared in *United States v. Caldes*, 457 F.2d 74 (9th Cir. 1972) (cited with approval in *United States v. Enmons*, 410 U.S. 396, 409 (1973)), "it appears to us that acts of vandalism of the type committed by these [defendants] would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court." 457 F.2d at 79 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

2. *The rules of statutory construction*

Essentially, petitioners' theory of extortion is that any garden-variety political protest aimed at an industry causes extortion to the extent that it adversely influences business and consumers. If businesses sell less, if consumers buy less, if fewer employees are employed, that is "extortion" of each of them. The extorter need *obtain* nothing; it is sufficient if the businesses, consumers, or employees are deprived of (or "give up") something. Furthermore, under this theory, the very nature of protest supplies the element of "actual or threatened force or fear." The theory profoundly contradicts several well-established norms of statutory construction.

a. *Avoiding constitutional difficulties*

It is a fundamental rule of statutory construction that legislation ought not, if a reasonable alternative is present, be interpreted in a manner that raises constitutional difficulties. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988); *New York v. United States,* 112 S. Ct. 2408, 2425 (1992). This rule of construction mandates fidelity to all of the elements of Hobbs Act extortion—including the elements missing from petitioners' complaint.

The right to free speech shelters a broad range of expressive activity, including forms of communication which many people might find offensive, coercive, and disruptive. *E.g., Texas v. Johnson,* 491 U.S. 397 (1989) (flag burning); *City of Houston v. Hill,* 482 U.S. 451 (1987) (confronting police officer); *Cohen v. California,* 403 U.S. 15 (1971) (profanity); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982) (boycotts enforced through public embarrassment); *Cantwell v. Connecticut,* 310 U.S. 296 (1940) (attacking religious beliefs). Even when protest activity inflicts economic injury, it does not thereby become unlawful. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1981); *Thornhill v. Alabama,* 310 U.S. 88 (1940).

BEST AVAILABLE COPY

The role of civil litigation to remedy unlawful conduct in the context of group protests is therefore sharply limited: "precision of regulation" is essential.[39] *Claiborne Hardware*, 458 U.S. at 916 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)). In order to establish civil liability, a plaintiff must show that each individual defendant had a specific intent to engage in unlawful activity; furthermore, legal remedies are only permissible for those losses that result from *unlawful* conduct. 458 U.S. at 918-21.

Petitioners' attempt to equate demonstrations with extortion does not meet the "heavy" burden of precision the first amendment imposes in this sensitive area in order to safeguard expressive "constitutionally protected activity." *Id.* at 933-34. This Court should therefore reject petitioners' perversely expansive reading of the Hobbs Act.

b. *Federalism*

Second, this Court is loathe to interpret federal statutes in ways that "upset the usual balance of federal and state powers." *New York v. United States*, 112 S. Ct. 2408, 2425 (1992). *See generally Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2401 (1991). "[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). This rule militates against turning the Hobbs Act into a device for federalizing such traditional state offenses as trespass, obstruction of public passage, and destruction of private property. *See United States v. Staszcuk*, 517 F.2d 53, 55 (7th Cir.) (en banc) (per Stevens, J.) (the "extraordinary growth of federal criminal litigation poses a serious threat to the quality of

---

[39] *See generally* Califa, *RICO Threatens Civil Liberties*, 43 Vand. L. Rev. 805, 806 (1990) ("using RICO in ideological disputes is inappropriate and harmful because it results in the chilling of First Amendment rights").

federal justice; moreover, this growth may not only reflect but contribute to the continuing transfer of power from the several states to the national government. . . . [W]e have no desire to accelerate this trend unnecessarily"), *cert. denied,* 423 U.S. 837 (1975).

This Court expressed the same caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> [It] would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

United States v. Enmons, 410 U.S. 396, 411 (1973) (citations omitted). These same principles govern the case at bar.

c. *Rule of lenity*

Third, any "uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Kozminski,* 487 U.S. 931, 952 (1988) (and cases cited). To accept petitioners' unprecedented expansion of the Hobbs Act would be to stand this rule on its head, as this would require both creating ambiguity over whether the statutory terms mean what they say, and then resolving that ambiguity in favor of an extremely broad interpretation.

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally,* 483 U.S. at 359-60 (citations omitted). This rule serves

many important purposes: "to promote fair notice to those subject to criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

As a criminal law, the Hobbs Act is subject to this rule of strict construction. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *McCormick v. United States*, 111 S. Ct. 1807, 1816 (1991). This Court must therefore reject petitioners' novel and highly strained construction of federal criminal "extortion."

* * * *

Petitioners have failed to allege facts that would constitute even a single predicate act of federal criminal extortion. Whereas the RICO statute requires at least *two* or more such predicate acts, petitioners' complaint is fatally deficient. It follows that there is simply no occasion even to reach the "economic purpose" question under RICO.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

KEITH A. FOURNIER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570

VINCENT P. MCCARTHY
8 South Main Street
New Milford, CT 06776
(203) 355-0923

JAY ALAN SEKULOW
(Counsel of Record)
WALTER M. WEBER
AMERICAN CENTER FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

Attorneys for Respondents Randall A. Terry, Project Life, and Operation Rescue

September 29, 1993